

1 COOLEY GODWARD KRONISH LLP
 2 MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
 2 LEO P. NORTON (216282) (lnorton@cooley.com)
 3 4401 Eastgate Mall
 3 San Diego, CA 92121
 4 Telephone: (858) 550-6000
 4 Facsimile: (858) 550-6420

5 Attorneys for Defendant
 6 GOOGLE INC.
 7

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

12 RK WEST, INC., a California corporation
 13 d/b/a Malibu Wholesale, individually and on
 13 Behalf of All Others Similarly Situated,

14 Plaintiff,
 15 v.

16 GOOGLE, INC., a Delaware corporation; and
 17 DOES 1 through 10, inclusive,

18 Defendants.

Case No. 08-CV-03452 RMW RS

**OPPOSITION TO
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED PURSUANT
TO CIVIL LOCAL RULE 3-12**

1 **I. INTRODUCTION**

2 Defendant Google Inc. (“Google”) opposes the administrative motion filed by Plaintiff
 3 RK West, Inc. (“RK West”), which represents nothing more than a preemptive strike against
 4 Google’s previously announced administrative motion to relate four cases pending in this district
 5 regarding Google’s AdWords advertising program, which Google concurrently filed with this
 6 opposition in the case *David Almeida v. Google, Inc.*, Case No. C 08-02088-RMW. RK West’s
 7 motion highlights the erosion of cooperation that has become all too common in putative class
 8 action cases. On August 25, 2008, four days before RK West filed its motion in this case, Google
 9 wrote all plaintiffs’ counsel and notified them that Google stood ready to file an administrative
 10 motion to relate four cases, provided copies of the four complaints, and requested that the
 11 plaintiffs stipulate, as Google was required to do under Civil Local Rule 7-11 before filing the
 12 motion, that the cases were related. Without the courtesy of responding to Google’s letter even
 13 after obtaining a one-week extension to do so, RK West filed its own administrative motion on
 14 August 29, 2008 seeking to relate three of the four cases that Google notified RK West that it
 15 intended to relate. Because RK West neglected to deliver the motion on the same day it was filed
 16 as required, and instead served it by mail, Google did not learn of RK West’s improper tactical
 17 maneuver until the late morning of September 2, 2008. Not surprisingly, considering RK West’s
 18 haste to preemptively file its administrative motion before Google, RK West’s motion suffers
 19 from numerous procedural and substantive defects. Consequently, it should be denied.

20 **II. BACKGROUND AND RK WEST’S QUESTIONABLE CONDUCT IN FILING ITS MOTION**

21 There are four cases presently pending against Google in this district relating to Google’s
 22 AdWords advertising program that are related and that should be reassigned for coordinated or
 23 consolidated proceedings before the same judge. Those cases are:

- 24 • *David Almeida v. Google, Inc.*, Case No. C 08-02088-RMW (“*Almeida case*”);
- 25 • *Hal K. Levitte v. Google, Inc.*, Case No. C 08-03369-JW (“*Levitte case*”);
- 26 • *RK West, Inc. v. Google, Inc.*, Case No. C 08-03452-RMW (“*RK West case*”); and
- 27 • *Pulaski & Middleman, LLC v. Google Inc.*, Case No. C 08-03888-SI (“*Pulaski case*”).¹

28 ¹ A copy of the *Almeida* case Complaint is attached as Exhibit 1 to the Declaration of Leo P.

On August 25, 2008, Google's counsel sent all plaintiffs' counsel a meet and confer letter that: (1) notified all plaintiffs that Google was prepared to file an administrative motion under Civil Local Rules 3-12 and 7-11 in the *Almeida* case; (2) provided all plaintiffs with copies of the complaints and the reasons why the cases were related; (3) attempted to reach a stipulation that the four cases are related as required under Civil Local Rule 7-11; and (4) requested that Google's deadline to respond to the *Levitte*, *RK West*, and *Pulaski* complaints be coordinated and extended until September 30, 2008. Norton Declaration, ¶ 3 & Exhibit 2. Plaintiff's counsel in the *Levitte* case, purportedly on behalf of all plaintiffs, requested a one-week extension to respond to September 3, 2008, and later stated they would respond by August 28, 2008. Norton Declaration, ¶ 4 & Exhibit 3. Having not yet received a response as of the morning of September 2, 2008, Google's counsel demanded a response by the end of the day. Norton Declaration, ¶ 5 & Exhibit 4. Later that morning, Google's counsel received by mail RK West's administrative motion. Norton Declaration, ¶ 7. As of the filing of this opposition, RK West has not responded to any aspect of Google's letter dated August 25, 2008, including Google's request for a consolidated response date. Norton Declaration, ¶ 6. Google has received responses from the plaintiffs in the *Levitte* and *Pulaski* cases, each taking the position that the *Almeida* case is not related but still stipulating to Google's request for a consolidated response deadline of September 30, 2008. Norton Declaration, ¶ 6.

III. RK WEST'S ADMINISTRATIVE MOTION SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY IMPROPER

RK West's motion should be denied on four independent procedural grounds: (1) RK West filed it in the wrong case; (2) RK West failed to deliver it to Google the same day it was filed; (3) RK West failed to meet and confer in an effort to obtain a stipulation; and (4) it is procedurally unnecessary in light of Google's administrative motion to relate all four Google AdWords advertising program putative class actions pending in this district.

Norton in Support of Opposition. A copy of the *Levitte* case Complaint is attached as Exhibit C to RK West's administrative motion. A copy of the *RK West* case Complaint is attached as Exhibit A to RK West's administrative motion. A copy of the *Pulaski* case complaint is attached as Exhibit B to RK West's administrative motion.

1 **A. RK West Filed Its Administrative Motion in the Wrong Case.**

2 Under Civil Local Rule 3-12(b), an administrative motion to relate cases must be filed in
 3 the low-numbered case. Civil L.R. 3-12(b). The *RK West* case plaintiff's administrative motion
 4 attempts to relate the following three cases:

- 5 • *Hal K. Levitte v. Google, Inc.*, Case No. C 08-03369-JW;
 6 • *RK West, Inc. v. Google, Inc.*, Case No. C 08-03452-RMW; and
 7 • *Pulaski & Middleman, LLC v. Google Inc.*, Case No. C 08-03888-SI.

8 The low-numbered case in this instance is the *Levitte* case, not the *RK West* case, and therefore
 9 RK West's administrative motion in this case was not properly filed and should be denied.

10 **B. RK West Failed To Deliver Its Administrative Motion to Google on the Same Day It Filed It As Required.**

12 Civil Local Rule 3-12(b) requires compliance with Civil Local Rule 7-11's requirements
 13 for Administrative Motions, and requires service on all known parties in the cases sought to be
 14 related. Civil L.R. 3-12(b). Civil Local Rule 7-11 requires that the "moving party must deliver
 15 the motion and all attachments to all other parties on the same day as the motion is filed." Civil
 16 L.R. 7-11(a). RK West failed to satisfy this requirement.

17 RK West filed its administrative motion on Friday, August 29, 2008. Document No. 10.
 18 Google did not receive the motion until Tuesday, September 2, 2008 because RK West served the
 19 motion and supporting documents by priority U.S. Mail, rather than delivering them on the same
 20 day as filed as required. Norton Declaration, ¶ 7. RK West's administrative motion should be
 21 denied for failure to adhere to Civil Local Rule 7-11.

22 **C. RK West Failed To Engage in Any Attempt to Obtain a Stipulation from Google as Required.**

24 Civil Local Rule 7-11(a) mandates that the moving party attempt to obtain a stipulation
 25 under Civil Local Rule 7-12 or submit a declaration that explains why a stipulation could not be
 26 obtained. Civil L.R. 7-11(a). RK West never communicated with Google regarding its
 27 administrative motion, nor did RK West ever respond to Google's attempt to obtain a stipulation
 28 on Google's administrative motion. Instead, RK West filed its administrative motion without

1 warning and knowing full well that Google stood ready to file its administrative motion but was
 2 waiting for a response from all plaintiffs' counsel before doing so. RK West should not be
 3 permitted to ignore the Local Rules. Having failed to adhere to Civil Local Rule 7-11(a), RK
 4 West's administrative motion should be denied.

5 **D. RK West's Administrative Motion Is Procedurally Unnecessary Because of**
6 Google's Administrative Motion Filed in the *Almeida* Case.

7 Google filed its own administrative motion to relate the *Almeida*, *Levitte*, *RK West*, and
 8 *Pulaski* cases. Because the *Almeida* case is the low-numbered case, Google filed its
 9 administrative motion in that action. Norton Declaration, ¶ 8. Google's motion renders RK
 10 West's motion unnecessary because Civil Local Rules 3-12 provides an opportunity for a party in
 11 RK West's position to contend that some, but less than all, of the cases subject to an
 12 administrative motion are related.

13 Civil Local Rule 3-12(e) allows a non-moving party to file a response to an administrative
 14 motion, and specifically provides that if "a party contends that not all of the cases are related, the
 15 party must address whether any of the cases are related to one another." Civil L.R. 3-12(e).
 16 Moreover, Civil Local Rule 3-12(f) provides that if the judge assigned to the low-numbered case
 17 (here, the *Almeida* case) decides that the cases are not related, the Clerk shall submit the order to
 18 the judges assigned to the other cases, in the order those cases were filed, to decide whether any
 19 of those cases are related. Civil L.R. 3-12(f)(2)-(3).

20 Rather than rushing to file its own preemptive administrative motion, the proper way for
 21 RK West to attempt to relate only the *Levitte*, *RK West*, and *Pulaski* cases would have been to
 22 oppose Google's administrative motion filed in the *Almeida* case, and request that the Court relate
 23 the *Levitte*, *RK West*, and *Pulaski* cases, but not the *Almeida* case. If the *Almeida* case judge
 24 denied the administrative motion, the judge in the *Levitte* case (Judge James Ware) could have
 25 related the *Levitte*, *RK West*, and *Pulaski* cases, which all parties in all cases agree at a minimum
 26 are related. RK West's failure to do so has resulted in needless duplicative administrative
 27 motions and the attendant expense of multiple filings in different cases. Moreover, in its rush to
 28 beat Google to the punch, RK West stumbled over numerous procedural requirements, including

1 filing its motion in the wrong case, without properly serving it, and without meeting and
 2 conferring. This attempt to circumvent the Civil Local Rules and take advantage of Google's
 3 efforts to meet and confer on the related case issue should be rejected.

4 **IV. RK WEST'S ADMINISTRATIVE MOTION SHOULD BE DENIED BECAUSE IT DOES NOT
 5 INCLUDE THE *ALMEIDA* CASE WHICH IS ALSO RELATED AND WHICH IS THE LOW-
 6 NUMBERED CASE**

7 RK West's administrative motion also fails substantively because it rests on the theory
 8 that the *Almeida* case is not related. RK West is wrong. The *Almeida* case, like the *Levitte*, *RK*
 9 *West*, and *Pulaski* cases, asserts claims against Google based on alleged issues with Google's
 10 AdWords advertising program. The claims are based on the same legal theories—unjust
 11 enrichment and California Business and Professions Code section 17200. Further, the cases
 12 involve overlapping putative class of Google AdWords customers. The only difference between
 13 the cases is the aspect of the AdWords advertising program being challenged. But that difference
 14 is insubstantial, and does not avoid the potential for unduly burdensome duplication of labor and
 15 expense in document and deposition discovery directed at Google's AdWords advertising
 16 program and the contracts that govern that program or conflicting results regarding at a minimum
 class certification.

17 **V. CONCLUSION**

18 RK West's administrative motion should be denied because it suffers from numerous
 19 procedural and substantive defects as set forth above.

20 Dated: September 4, 2008

COOLEY GODWARD KRONISH LLP
 MICHAEL G. RHODES (116127)
 LEO P. NORTON (216282)

22 By: _____ /s/Leo P. Norton
 23 _____
 Leo P. Norton

24 Attorneys for Defendant GOOGLE INC.
 25
 26
 27
 28

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2008, I electronically filed the foregoing **OPPOSITION TO ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED PURSUANT TO CIVIL LOCAL RULE 3-12** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record at the following listed email addresses.

- **Brian S. Kabateck**
bsk@kbklawyers.com
 - **Richard Kellner**
rlk@kbklawyers.com,rs@kbklawyers.com
 - **Alfredo Torrijos**
at@kbklawyers.com,icd@kbklawyers.com

I also hereby certify that I caused the foregoing document to be personally delivered by consigning the document(s) to an authorized courier and/or process server for hand delivery on this 4th day of September, 2008 to the following listed addresses.

11 Erik Swen Syverson
12 Pick & Boydston, LLP
13 1000 Wilshire Boulevard
4 Suite 600
Los Angeles, CA 90017
Attorneys for Plaintiff RK West, Inc.

1 Guido Saveri
 2 R. Alexander Saveri
 3 Cadio Zirpoli
 4 Saveri & Saveri Inc.
 5 111 Pine Street
 6 Suite 1700
 7 San Francisco , CA 94111
*Attorneys for Plaintiff Pulaski & Middleman,
 LLC*

8 Robert C. Schubert
 9 Willem F. Jonckheer
 10 Kimberly Ann Kralowec
 11 Schubert Jonckheer Kolbe & Kralowec LLP
 12 Three Embarcadero Center
 13 Suite 1650
 14 San Francisco , CA 94111
Attorneys for Plaintiff Hal K. Levitte

15 Hon. James Ware
 16 United States District Court
 17 Northern District of California
 18 280 South 1st Street
 19 Courtroom 8, 4th Floor
 20 San Jose, CA 95113
COURTESY COPY
Hal K. Levitte, Case No. 08-cv-03369

21 602140 /SD
 22
 23
 24
 25
 26
 27
 28

Terry Gross
 Adam C. Belsky
 Monique Alonso
 Gross Belsky Alonso LLP
 180 Montgomery Street
 Suite 2200
 San Francisco , CA 94104
*Attorneys for Plaintiff Pulaski & Middleman,
 LLC*

Hon. Susan Illston
 United States District Court
 Northern District of California
 450 Golden Gate Ave.
 Courtroom 10, 19th Floor
 San Francisco, CA 94102
COURTESY COPY
*Pulaski & Middleman, LLC v. Google Inc.,
 Case No. 08-cv-03888*



Kendra Jones
 COOLEY GODWARD KRONISH LLP
 4401 Eastgate Mall
 San Diego, CA 92121-1909
 Telephone: (858) 550-6000
 FAX: (858) 550-6420
 Email: kjones@cooley.com